proceedings of January 1880. We concur with the lower Court in thinking that in doing this he was going beyond what the applicants had asked for. We think that the proper order to pass in the case is that the execution should now issue as prayed by the applicants. The present appeal must be admitted with costs.

Appeal allowed.

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MOHUN CHUNDER KURMOKAR v. MOHESH CHUNDER KURMOKAR.

Before Mr. Justice Field and Mr. Justice Norris.

UMA SUNKUR SIRKAR (DEFENDANT) *v.* TARINI CHUNDER SINGH (PLAINTIFF).*

1882. *July* 26.

Kabuliat, Construction of—Abatement of rent for land acquired by Government for public purposes.

In a suit for rent by a zemindar against a patnidar, the latter claimed abatement of the rent on the ground that part of the land included in the patni tenure had been acquired by the Government for public purposes.

The kabuliat executed by the patnidar contained a provision to the effect that, if any of the land settled should be taken up by Government for public purposes, the zemindar and the patnidar should divide and take in equal shares the compensation money, and a further provision to the effect that the patnidar should "make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by this kabuliat."

Held that the patnidar was entitled to abatement of the rent.

IN this suit the plaintiff (zemindar) sued the defendant (patnidar) for rent calculated at the full rate fixed by the patni settlement. The defendant's claim for abatement having been rejected by both the lower Courts, the defendant appealed to the High Court.

Baboo *Kashi Kant Sen* for the appellant.

Baboo *Bhowany Churn Dutt* for the respondent.

The following judgments were delivered:—

FIELD, J.—The question in this case is concerned with the construction of a patni kabuliat.

Some land included in the patni was taken up by Government

* Appeal from Appellate Decree No. 478 of 1881 against the decree of Baboo Amrito Lall Chatterjee, Subordinate Judge of Nuddea, dated the 29th December 1880, affirming the decree of Baboo Behari Lal Banerjee, Second Munsiff of Kooshtea, dated the 1st August 1879.

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for public purposes, and the patnidar now claims abatement of rent from the zemindar in respect of the land so taken. The contention of the zemindar is that the patnidar is, by an express covenant contained in the patni kabuliat, debarred from making any such claim for abatement. The patni kabuliat first contains an agreement to the following effect: that if land be taken up by Government for a railway, a ferry fund or other purposes, the zemindar and the patnidar shall divide the compensation paid by Government in respect of such land, each receiving one moiety. There is then a further clause which may be roughly translated as follows: "I shall make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by this kabuliat." I propose to construe this second clause first; and the question which I have to decide is, whether the taking of land for public purposes by Government is a cause of the same kind as diluvion. If this question is to be answered in the affirmative, then this particular clause in the kabuliat precludes the patnidar from claiming abatement of rent. It appears to me that the taking of land by Government for a public purpose is not a cause of the same nature as diluvion; and for this reason. When land is washed away by the action of the river, the thing itself out of which the rent issues is destroyed, certainly for a time, although it is quite possible that by the action of the same river there may be a re-formation. But in the case of a re-formation the custom of this country is, that where abatement has been allowed for diluvion, enhancement is claimable for alluvion. When land is taken up by Government, the thing itself out of which the rent issues is not destroyed; it continues to exist and the Government pays what must be taken to be the market value of the land at the particular time. It, therefore, appears to me that it is impossible to say that the taking of land by Government for public purposes is a cause *ejusdem generis* (of the same kind) with diluvion. This disposes of the second clause.

I now proceed to deal with the first clause. As to the meaning of this clause there can be no possible doubt. The parties agreed that the zemindar should receive one moiety of the compensation, and the patnidar the other moiety. There is no express covenant as to whether there shall be an abatement of rent or not.

We have then to consider whether it is equitable that the zemindar having received a portion of the compensation money, in other words, having received to a certain extent the value of the annuity which he has reserved out of the land demised by the patni lease, should be entitled to continue to receive the whole of that annuity without diminution. It appears to me that this would not be equitable; and that where the zemindar receives a portion of the compensation money, it is reasonable that he should grant an abatement of the patni rent to the patnidar. I take it that the stipulation in the patni kabuliat was intended merely to be a solution of a question which constantly arises in compensation cases, and which it is extremely difficult to decide without a measurement of the whole area of the patni tenure, in other words, that it was intended to settle, as between the zemindar and the patnidar, the principle upon which the compensation for land taken up by Government for public purposes should be apportioned between the parties. In many cases the patnidar's interest is of more value than the zemindar's interest, and there are probably few cases in which the zemindari interest would exceed the value of the patni interest. I take it therefore that this stipulation, that the parties should divide the compensation money in equal moieties, is an agreement between them merely as to the apportionment of the compensation, and that it was not intended to lay down any rule between these parties as to abatement of rent, which must be taken to be left to the general law of the country; and I think that as the patnidar has suffered a diminution of the area of the thing demised to him, he is entitled to an abatement of the patni rent payable by him. The case must therefore go back to the Court of first instance in order that that Court may decide what is a reasonable abatement under the circumstances. The costs of all Courts will abide the result.

NORRIS, J.—I am of the same opinion. In construing this document it cannot reasonably be held that the taking of part of the land by the Government for the purposes of a railway is *ejusdem generis* with land abating or increasing by reason of diluvion and alluvion, or, in other words, by the act of God; and I am strengthened in coming to this conclusion when it is manifest that there

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was present before the minds of the parties, at the time the patni settlement was granted by the plaintiff, the fact that Government was likely to take a portion of the land included in the settlement for the purposes of a railway; and if the parties intended that there should be no abatement of rent when Government exercised their powers, in addition to making an express provision for the distribution of the compensation money, they would have further stated that there would be no abatement of rent. I am of opinion that the true construction of this document is that the parties intended by an arrangement between themselves, to arrive at a conclusion, as to how the compensation money paid by Government should be divided between the parties. The relation of zemindar and patnidar may be taken as that of lessor and lessee. The lessee in 99 cases out of 100 has a beneficial occupation, and in so far as he has the beneficial occupation, he is entitled, when turned out of a part of his holding, to be compensated for the loss he suffers by reason of such eviction. The zemindar also, who answers to the lessor or free-holder, is entitled to be paid for the land actually taken, and instead of calling into play some abstruse method of calculation, the parties agreed as to the proportions in which the lessee should be compensated for the loss of his leasehold interest in the land, and the zemindar for his freehold interest. After the question of compensation has been determined, there still remains the question of the quantum of abatement in the rent which the lessor should allow the lessee. In England a machinery is provided. In the Lands Clauses Act there exists a machinery for the settlement of the abatement. It is a matter of calculation, and if the parties cannot agree, provision is made for the settlement of the amount by justice. No such machinery exists in this country, and I am therefore of opinion that the case must be remanded as directed by my learned brother.

Appeal allowed and case remanded.